



## Panel: International Law in the U.S. Courts: Current Issues, Future Trends

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### Summary and Reference Materials

#### The Alien Tort Statute and Customary International Law -- Sosa v. Alvarez-Machain

##### I. Background: Customary International Law in U.S. Courts

Although some aspects of the status of customary international law in U.S. courts are disputed, it is clear that Congress can incorporate customary international law into U.S. law and can instruct courts to apply international law norms as rules of decision.

Example: U.S. v. Smith, 18 U.S. 153, 157 (1820), in which the Supreme Court upheld the constitutionality of a federal statute punishing “the crime of piracy, as defined by the law of nations . . . .”

##### II. The Alien Tort Statute

The Alien Tort Statute, 28 U.S.C. § 1350, provides: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” The statute was enacted in 1789 as part of the first Judiciary Act, with only a sparse historical record.

The ATS was largely ignored until the Second Circuit decision in *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), a case filed by the relatives of a Paraguayan man tortured to death in Paraguay by a Paraguayan police officer who was living in New York City at the time the lawsuit was filed. *Filártiga* held

that the statute provides jurisdiction over claims for violations of modern international law norms, including torture.

Subsequent cases over the next fifteen years applied the ATS to claims such as summary execution, disappearance, war crimes, crimes against humanity and arbitrary detention, as well as torture. Defendants included commanders as well as the direct perpetrators of the violations.

In 1995, in *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), the Second Circuit held that the statute permitted suit against private actors if they either (1) acted in complicity with state actors or (2) committed one of the small number of international law violations that do not require state action, including genocide, slavery and certain war crimes.

Controversy grew in the mid 1990s, as cases were filed against corporations. In 2002, the Ninth Circuit held that Unocal Oil could be sued for aiding and abetting forced labor and other violations in Burma. *Doe v. Unocal Oil Corp.*, 395 F.3d 932 (9th Cir. 2002). The panel split over the source of the aiding and abetting standard (the majority looked to international law, the concurring judge relied on federal common law) and the Circuit granted a hearing en banc, but the case was settled before re-argument.

About 80 reported decisions involving ATS claims were issued between 1980 and 2004; most were dismissed, the majority for failure to state a violation of international law or because the defendants were immune from suit. Successful claims generally involved an egregious human rights violation, an individual defendant not entitled to diplomatic or other immunities, and the absence of an adequate forum in the country where the abuses took place.

### III. Background: Related Statutes

Human rights claims are also litigated pursuant to several related statutes.

Torture Victim Protection Act (TVPA), enacted in 1992 and codified as a note to the ATS, 28 U.S.C. § 1350 (note): the TVPA creates a federal cause of action for torture or extrajudicial execution against an individual acting “under actual or apparent authority, or color of law, of any foreign nation,” and requires exhaustion of domestic remedies.

“State Sponsors of Terrorism” exception to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(7): permits claims for torture, extrajudicial execution, hostage taking or aircraft sabotage against a foreign state on the State Department’s list of “state sponsors of terrorism.” Five states are currently on the list (Cuba, Iran, North Korea, Sudan, Syria); two were recently removed (Iraq, Libya).

Anti-Terrorism Act, 18 U.S.C. § 2333, authorizes a U.S. national “injured in his or her person, property, or business by reason of an act of international terrorism” to sue for treble damages.

Cases may also be litigated as state law claims, seeking damages, for example, for wrongful death or assault and battery. Some pending cases allege RICO claims. Two more recent statutes also permit suits for particular human rights abuses: the Trafficking Victims Protection Act, 18 U.S.C. § 1595 (amended in 2003 to provide a civil action for victims of trafficking), and the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb.

#### IV. The ATS, Customary International Law and Federal Common Law

Although the ATS clearly provides jurisdiction, pre-Sosa ATS decisions applied different theories as to the source of the cause of action.

- some held that customary international law is federal law and provides a cause of action
  - under this theory, jurisdiction is also provided by § 1331;
- some held that the ATS created both jurisdiction and a cause of action;
- some held that in enacting the ATS, Congress had delegated to the courts the task of developing common law remedies for violations of customary international law.

Each of these theories had flaws. The first Congress would have assumed that the common law provided a cause of action for a violation of international law, and would have viewed as superfluous the creation of a cause of action or even an instruction to the courts to recognize one. Critics argued that a common law cause of action would have been part of the general common law, and that Erie and its rejection of federal general common law barred the modern federal courts from recognizing a cause of action for ATS claims.

By the time the Supreme Court addressed the issue, scholars had proposed a different approach, one that was accepted by the majority in Sosa: given that the ATS was enacted on the understanding that the federal courts would recognize a federal common law cause of action for a narrow set of international law claims, modern courts should continue to do so for analogous claims.

#### V. Sosa v. Alvarez-Machain

After repeatedly denying review of ATS cases, the Supreme Court in 2004 decided Sosa v. Alvarez-Machain, 542 U.S. 692 (2004), a case filed by a Mexican man who was kidnapped in Mexico by vigilantes hired by the U.S. Drug

Enforcement Agency and brought to the United States to face trial (he was later acquitted). The Ninth Circuit en banc ruled that Alvarez could sue Sosa, one of the kidnappers, for arbitrary detention under the ATS. (The Ninth Circuit also held that Alvarez could sue the U.S. government for false imprisonment under the Federal Tort Claims Act; Sosa overturned that holding.)

In the Supreme Court's first consideration of the *Filártiga* application of the ATS, Sosa concluded that Congress enacted the ATS with the understanding that the federal courts would use their common law powers to recognize a cause of action for a small group of violations of customary international law. Over the dissent of Justice Scalia (joined by Justices Rehnquist and Thomas), the Court held that nothing in *Erie* or related changes in the conception of the powers of the federal courts barred this use of common law judicial powers.

Thus the court held that federal courts today should assert jurisdiction over a "narrow class" of international law violations that are comparable to the claims that would have been recognized in the eighteenth century: violations of norms "of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" upon which the statute was based. (At 724-25.)

The Court stressed that the federal courts should use caution in recognizing these widely accepted, clearly defined norms to avoid infringing on the foreign affairs powers of the executive branch. Sosa concluded by rejecting Alvarez's claims for arbitrary detention, ruling that the international prohibition was too general, and Alvarez's claimed violation too technical, to support an ATS claim.

## VI. Overview of Post-Sosa Cases

Post-Sosa ATS litigation involves an increasingly diverse set of defendants. There have been approximately 50 reported decisions since Sosa.

-- Fewer than 10 involve individual defendants.

-- About a third – approximately 17 – were filed against the U.S. government: all have been dismissed on the basis of the political question doctrine, state secrets and/or sovereign immunity.

-- About two dozen involve claims against corporate defendants: of these, only half address modern abuses committed abroad; the rest concern either U.S. victims of the 9/11 attacks or historic justice claims, mostly arising out of World War II.

### Circuit court decisions

The Eleventh Circuit has decided four ATS cases since *Sosa*, upholding application of aiding and abetting liability to an individual defendant (*Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005)); applying a flexible standard to authorize tolling of the statute of limitations (*Cabello; Arce v. Garcia*, 434 F.3d 1254 (11th Cir. 2006); *Jean v. Dorelien*, 431 F.3d 776 (11th Cir. 2005)); and permitting a corporation to be sued for mental torture (*Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005)).

The Seventh Circuit, in its first consideration of the ATS, held that claims for torture and extrajudicial execution can only be brought pursuant to the TVPA, not the ATS (*Enahoro v. Abubakar*, 408 F.3d 877 (7th Cir. 2005)); the Ninth and Eleventh Circuit have declined to follow this holding (*Sarei v. Rio Tinto, PLC*, 456 F.3d 1069 (9th Cir. 2006); *Aldana*).

The Ninth Circuit reversed a political question dismissal, rejecting concerns expressed in an executive branch Statement of Interest, and also held that the ATS does not require exhaustion of domestic remedies (*Sarei*).

Several cases are currently pending before the Second Circuit.

## VII. Post-Sosa Issues

### (A) What law -- federal common law or international law -- governs particular issues

Sosa made clear that the substantive violation should be governed by international law – e.g. the definitions of torture or summary execution. But two key choice-of-law disputes were left unresolved: (1) what law provides the standard for complicity liability -- particularly aiding and abetting liability; and (2) what law determines what categories of defendants can be held liable -- particularly corporations.

All decisions to date have held that corporations can be held liable, but they have split about aiding and abetting and other complicity doctrines.

### (B) For issues that are governed by international law, how to determine the content of that law

In determining the content of international law, the post-Sosa courts have disagreed about the relevance of the decisions of international criminal tribunals and of non-binding international law instruments.

### (C) Application of the political question and other abstention doctrines

The courts have struggled to determine the degree of deference due to the position of the executive branch.

### (D) Exhaustion of domestic remedies

Courts disagree about whether the requirement that a plaintiff first exhaust domestic remedies should be implied into the ATS.

## The Alien Tort Statute and Customary International Law: Sosa v. Alvarez-Machain

### Sources

#### I. Statutes

Alien Tort Statute (ATS), 28 U.S.C. § 1350

Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 (note)

“State Sponsors of Terrorism” exception to the Foreign Sovereign Immunities Act,

28 U.S.C. § 1605(a)(7)

Anti-Terrorism Act, 18 U.S.C. § 2333

Trafficking Victims Protection Act, 18 U.S.C. § 1595

Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb.

#### II. Key cases

##### A. Pre-Sosa

Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980)

In the first modern application of the Alien Tort Statute (ATS), Paraguayan citizens sued a Paraguayan police officer for torturing a family member to death. The Second Circuit held that the ATS provides jurisdiction over suits for violations of the law of nations, interpreting the law of nations as it exists today, not as it did in 1789.

Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995)

An ATS suit against Radovan Karadzic, leader of the unrecognized Serb entity “Srpska,” alleged genocide, war crimes, crimes against humanity, torture and summary execution. The lower court held that Karadzic was a private actor and could not violate international law. The Second Circuit reversed, holding that the ATS recognizes violations that do not require official action, including genocide, war crimes, piracy, and slave trading. The court also held that the state action requirement of other violations is satisfied if a private person acts in complicity with a state actor.

Doe v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002) (hearing en banc granted, vacating this decision; case was then settled)

Burmese citizens filed ATS claims for forced labor and other violations committed by the Burmese military in connection with construction of an oil pipeline. On appeal from a decision granting Unocal’s motion for summary judgment, the Ninth Circuit applied an international law definition of complicity liability, holding that a defendant can be held liable for aiding and abetting international law violations if it provides “knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime.” A concurring opinion would have based the standard in U.S. common law. The Ninth Circuit voted to hear the case en banc, vacating this opinion; before that hearing, the parties settled. The standard developed by the vacated decision is still relied on by some cases and commentators.

## B. Sosa

### Sosa v. Alvarez-Machain, 542 U.S. 692 (2004)

A Mexican doctor was kidnapped in Mexico by agents hired by the U.S. government and flown to the United States for trial on charges that he had participated in the torture and murder of a U.S. drug enforcement agent. In a prior U.S. Supreme Court decision, the Court found that U.S. courts had jurisdiction over him even though he was brought to the United States in violation of the U.S.-Mexico extradition treaty. After trial on the criminal charges, he was acquitted on all counts. Alvarez-Machain then sued for damages under the ATS for various human rights violations. By the time the case reached the Supreme Court, the only remaining ATS claim sought damages for arbitrary detention during the time he was held in Mexico.

In its first consideration of the *Filártiga* interpretation of the ATS, the Supreme Court ruled that the statute permits claims for a small group of modern international law violations, those that are as well accepted and clearly defined as the claims recognized by Congress when it enacted the statute in 1789. The Court found that the detention of Alvarez-Machain did not meet this standard. The Court instructed the lower courts to use caution in applying the ATS, an admonition some courts have interpreted as requiring an extra level scrutiny over ATS claims, while other courts have concluded that the caution is built into the Court's requirement that only well accepted, clearly defined claims trigger ATS jurisdiction.

## C. Post-Sosa Circuit Court decisions

### Sarei v. Rio Tinto, PLC, 456 F.3d 1069 (9th Cir. 2006)

Residents of Papua New Guinea (PNG) brought an ATS suit against Rio Tinto for acting with the PNG government to commit acts of racial discrimination, environmental destruction, crimes against humanity, and war crimes. The U.S. State Department filed a Statement of Interest (SOI) advising that proceeding with the litigation would interfere with U.S. foreign policy. The district court dismissed the claim as a political question, relying on the SOI. On appeal, the Ninth Circuit reversed, ruling that the SOI was entitled to “serious weight” but that it would not be controlling. The court concluded that the impact of the case on U.S. foreign policy would not be significant.

The Circuit also held that the ATS does not require exhaustion of domestic remedies, despite language in *Sosa* suggesting that it might impose such a requirement. (In *Sosa*, the Supreme Court stated, “We would certainly consider this requirement in an appropriate case.” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004).) A petition for hearing en banc is pending.

Arce v. Garcia, 434 F.3d 1254 (11th Cir. 2006)

In a case against two Salvadoran generals, the court upheld a jury verdict for torture and rejected a challenge to the district court’s finding that the statute of limitations had been tolled.

Jean v. Dorelien, 431 F.3d 776 (11th Cir. 2005)

In a case against a Haitian military officer for extrajudicial killing, torture and arbitrary detention, the 11th Circuit reversed a dismissal based on the statute of limitations and failure to exhaust domestic remedies, finding that the statute had been tolled and that the defendant failed to establish that remedies were available in Haiti.

Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242 (11th Cir. 2005)

Guatemalan labor unionists sued owner of Guatemalan banana plantation for torture and other human rights violations. The circuit affirmed dismissal of the non-torture claims, but reversed dismissal of a claim for mental torture.

Enahoro v. Abubakar, 408 F.3d 877 (7th Cir. 2005)

In the first Seventh Circuit application of the ATS, the court held that post-Sosa claims for torture and summary execution must be brought pursuant to the Torture Victim Protection Act, a result that none of the pre-Sosa cases had reached. Both the Ninth and the Eleventh Circuit have rejected this holding. Sarei, 456 F.3d at 1093, n.26; Aldana, 416 F.3d at 1250-51.

Cabello v. Fernandez-Larios, 402 F.3d 1148 (11th Cir. 2005)

In a case against a Chilean army officer, the Circuit Court upheld a jury verdict for extrajudicial killing, torture, crimes against humanity, and cruel, inhuman and degrading treatment, and rejected a challenge to the district court's finding that the statute of limitations had been tolled.

D. A few key post-Sosa District Court decisions

Bowoto v. Chevron Corp., 2006 WL 2455752 (N.D. Cal. Aug. 22, 2006)

Nigerians brought an ATS suit against Chevron for aiding and abetting extrajudicial killings and other violations by government forces. The court held that private corporations can be liable for aiding and abetting under the ATS, but refused to apply "color of law" principles to hold liable a private corporation that assists a state actor in the commission of a

violation that requires state action. A motion to reconsider this ruling is currently pending.

Presbyterian Church of Sudan v. Talisman Energy, Inc., 2006 WL 2602145 (S.D.N.Y. Sept. 12, 2006)

Citizens of Sudan brought an ATS suit against Talisman, a Canadian corporation, alleging that it acted in concert with the Sudanese government to ethnically cleanse non-Muslims in southern Sudan, committing abuses that constitute genocide and crimes against humanity. In a series of decisions, the court has held that corporations can be held liable under the ATS both for direct violations of international norms and for aiding and abetting international law violations. The court reaffirmed this ruling post-Sosa. However, the court recently granted defendant's motion for summary judgment, holding that plaintiffs did not have sufficient evidence linking the defendant to the alleged abuses. An appeal is pending.

Doe v. Saravia, 348 F. Supp. 2d 1112 (E.D. Cal. 2004)

In a case alleging liability for the assassination of Archbishop Oscar Romero in El Salvador, the court held that claims of extrajudicial execution and crimes against humanity triggered ATS jurisdiction, relying on pre-Sosa decisions. The district court interpreted the Sosa requirement of a widely accepted, clearly defined violation as the functional equivalent of the pre-Sosa test, which required a "specific, universal and definable" international norm.

In re South Africa Apartheid Litigation, 346 F. Supp. 2d 538 (S.D.N.Y. 2004) Suit was brought on behalf of thousands of South African victims of apartheid against hundreds of corporations active in South Africa during the apartheid regime. The suit alleged that multinational corporations

doing business in South Africa at that time benefitted from cheap labor and provided resources to the South African government that were used to further apartheid. In dismissing the case for lack of subject matter jurisdiction, the court found insufficient allegations that any of the defendants had directly committed human rights abuses and rejected application of aiding and abetting liability. This case is pending on appeal.

### III. Suggested law review articles

#### (1) Understanding Sosa

William R. Casto, The New Federal Common Law of Tort Remedies For Violations of International Law, 37 Rutgers L. Rev. 635 (2006) (a recent analysis of the implications of Sosa; the Sosa opinion relied heavily on Professor Casto's historical analysis to decipher the meaning of the ATS)

William S. Dodge, Bridging Erie: Customary International Law in the U.S. Legal System after Sosa v. Alvarez-Machain, 12 Tulsa J. Comp. & Int'l L. 87 (2004) (an analysis of Sosa's implications for federal common law and customary international law; the Supreme Court in Sosa adopted the theory of the ATS proposed in an amicus brief drafted by Professor Dodge)

#### (2) Federal Common Law and Customary International Law

A 1997 article by Professors Bradley and Goldsmith triggered a heated debate about the relationship between federal common law and customary international law (Justice Scalia's dissent in Sosa adopted their position) and triggered many responses. They recently completed an analysis of Sosa which will be published soon. What follows are cites to their work and some of the responses:

Curtis A. Bradley & Jack L. Goldsmith, Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 Harv. L. Rev. 815 (1997)

Harold Hongju Koh, Is International Law Really State Law?, 111 Harv. L. Rev. 1824 (1998)

Gerald L. Neuman, Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith, 66 Fordham L. Rev. 371 (1997)

Beth Stephens, The Law of Our Land: Customary International Law as Federal Law After Erie, 66 Fordham L. Rev. 393 (1997)

Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, Sosa, Customary International Law, and the Continuing Relevance of Erie, forthcoming Harvard Law Review (2007), available at <http://ssrn.com/abstract=924987>